Mahkota Technologies Sdn Bhd (formerly known as The General Electric Co (M) Sdn Bhd) v BS Civil Engineering Sdn Bhd

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–94 OF 1998
VINCENT NG J
4 MARCH 2000

Civil Procedure *— Set-off — Availability — No intention to exclude right of set-off in contract — Whether right of set-off extinguished by Supreme Court decision*

Civil Procedure *— Summary judgment — Set-off claim by defendant — Whether right of set-off available — No intention to exclude right of set-off in contract — Delay in completion of work and dispute as to contents of certificate of practical completion — Whether triable issues — Whether summary judgment ought to be granted*

The plaintiffs entered into a sub-contract with the defendants to supply and to install four units of lifts and 22 units of escalators at a premise known as Plaza Putra, Alor Setar. Whilst the plaintiffs claimed that they were entitled to payment as they had fulfilled their contractual obligations to the satisfaction of the architect, the defendants contended otherwise. They alleged, amongst other things, that the plaintiffs' work was shoddy and that the plaintiffs failed to complete the contract work within time. Towards the recovery of their loss, the defendants filed a counterclaim wherein the amount sought was in excess of the plaintiffs' claim. They were, thus, entitled to withhold payment. It was submitted that the defendants' allegations were baseless and ought to be dismissed on two grounds, ie: (i) the common-law right of set-off in contracts of this nature had been extinguished and thus is no longer available to the defendants; and (ii) the defendants did not have any evidence to support their counterclaim. It was also contended that in order to succeed on their claim, the defendants, by virtue of cl 8 of the sub-contract, was required to produce the architect's certification that there was delay and/or shoddy work. No such certificate was ever produced at the hearing of the application. The senior assistant registrar dismissed the plaintiff's application for summary judgment against the defendants. The defendants appealed.

Held, dismissing the appeal:

(1) From the wording of the sub-contract entered into in the present case, the court could not find anything, be it express or implied, to the effect that the parties had intended to exclude the right of set-off. In fact, the defendant's right to set-off against any sum or sums due has been clearly preserved by cl 13 of the sub-contract. Also, as the defendant's counterclaim was far in excess of the plaintiff's claim, the court was of the view that the learned senior assistant registrar was right in allowing unconditional leave to

defend. Moreover, there was also a triable issue in relation to the plaintiff's alleged defective work (see p 510C, G).

(2) In respect of the allegation of delay in completion of the work and dispute as to the contents of the certificate of practical completion, it is the maker, ie the architect who should clarify and enlighten the court on the contents of the certificate. And since there was no clarification by way of affidavit, the architect's explanation should be heard at the trial (see p 512A).

(3) The court was also satisfied that there were some real basis worthy of investigation into the alleged defective works, or a claim for damages for delay (see p 512B).

[Bahasa Malaysia summary

Plaintif-plaintif telah memasuki satu sub-kontrak dengan defendan-defendan bagi membekalkan dan memasang empat unit lif dan 22 unit eskalator di sebuah premis yang dikenali sebagai Plaza Putra, Alor Setar. Sementara plaintif-plaintif menuntut bahawa mereka berhak kepada pembayaran kerana mereka telah melaksanakan kewajipan-kewajipan kontraktual mereka menurut kepuasan akitek, defendan-defendan pula menegaskan sebaliknya. Mereka mendakwa, antara lain, bahawa kerja plaintif-plaintif adalah kurang bermutu dan bahawa plaintif-plaintif telah gagal menyiapkan kerja kontrak tersebut dalam tempohnya. Defendan-defendan telah memfailkan satu tuntutan balas bagi memperoleh semula kerugian mereka, di mana jumlah yang dituntut melebihi tuntutan plaintif-plaintif. Oleh itu, mereka berhak untuk menahan pembayaran. Adalah dihujahkan bahawa dakwaan-dakwaan defendan-defendan adalah tidak berasas dan haruslah ditolak atas dua alasan, iaitu: (i) hak common-law bagi penolakan dalam kontrak-kontrak seperti ini telah dihapuskan dan dengan itu tidak lagi tersedia ada untuk defendan-defendan; (ii) defendan-defendan tidak mempunyai sebarang keterangan bagi menyokong tuntutan balas mereka. Adalah juga ditegaskan bahawa untuk berjaya dalam tuntutan mereka, defendan-defendan, menurut fasal 8 sub-kontrak tersebut, dikehendaki mengemukakan perakuan arkitek bahawa berlakunya kelewatan dan/atau kerja yang tidak bermutu. Perakuan sedemikian telah tidak pernah dikemukakan di perbicaraan permohonan tersebut. Penolong kanan pendaftar telah menolak permohonan plaintif untuk penghakiman terus terhadap defendan-defendan. Defendan-defendan telah merayu.

Diputuskan, menolak rayuan:

(1) Daripada perkataan sub-kontrak yang telah dimasuki dalam kes semasa ini, mahkamah tidak menjumpai apa-apa, sama ada secara nyata atau pun tersirat, yang bermaksud bahawa pihak-pihak yang berkenaan berniat untuk mengecualikan hak penolakan. Pada hakikatnya, hak defendan kepada penolakan terhadap apa-apa

jumlah atau jumlah-jumlah yang kena dibayar telah dengan jelasnya dikekalkan oleh fasal 13 sub-kontrak tersebut. Juga, oleh kerana tuntutan balas defendan jauh melebihi tuntutan plaintif, mahkamah berpendapat bahawa penolong kanan pendaftar yang arif adalah betul dalam memberikan kebenaran tanpa bersyarat untuk membela. Lagipun, terdapatnya isu yang boleh dibicarakan berhubung dengan kerja plaintif yang didakwa cacat itu (lihat ms 510C, G).

(2) Berhubung dengan dakwaan kelewatan menyiapkan kerja tersebut dan pertikaian berhubung dengan kandungan perakuan penyiapan praktikal, pembuatnya, iaitu arkiteklah yang seharusnya memperjelaskan dan menerangkan kepada mahkamah mengenai kandungan perakuan tersebut. Dan oleh kerana tiada penjelasan melalui afidavit, penerangan arkitek seharusnya didengar melalui perbicaraan (lihat ms 512A).

(3) Mahkamah juga berpuas hati bahawa terdapat asas benar yang melayakkan penyiasatan ke dalam kerja-kerja cacat yang didakwa itu, atau pun satu tuntutan untuk ganti rugi kerana kelewatan (lihat ms 512B).]

Notes

For cases on set-off, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) pras 4165–4178.

For cases on summary judgment generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) pras 4372–4778.

Cases referred to

Dawnays Ltd v Fg Minter Ltd & Anor [1971] 2 All ER 1389; 1 WLR 1205 (refd)

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689; [1973] 3 All ER 195 (refd)

Mondel v Steel (1841) 8 M & W 858; [1835–42] All ER Rep 511 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre [1995] 2 MLJ 57 (refd)

Legislation referred to

Rules of the High Court 1980 O 56 r 2

Siau Suen Miin (*Suen Miin & Co*) for the appellants/plaintiffs.

Kartar Singh (*Kartar Singh Dhaliwal & Co*) for the respondents/defendants.

Vincent Ng J: The present appeal arises from the learned senior assistant registrar's dismissal of the appellants'/plaintiffs ('plaintiffs') application for summary judgment against the respondents/defendants ('defendants').

On the date of the hearing of the appeal, En Kartar Singh, the learned counsel for the defendants raised two preliminary objections. Firstly, that the notice of appeal was irregular and, secondly, that the service of the summons-in-chambers (encl 7) and the affidavit filed in support of encl 7, (encl 8) were bad in law. I do not propose to deal in detail the latter objection. It suffices to say that I agree with En Siau Suen Miin, the learned counsel for the plaintiffs, that it cannot stand as the defendants' conduct in filing several affidavits in reply in the wake of encl 8, and its failure to raise the matter before the senior assistant registrar amounts to a waiver.

On the issue of the notice of appeal, En Kartar Singh submits that there was non compliance of O 56 r 2 of the Rules of the High Court 1980, in that the plaintiffs had substituted the phrase 'dismissed with costs' for the phrase 'refusing to order' in Form 114 prescribed under the provision. To my mind, this difference in terminology is, at most, a slight irregularity, and as there is no evidence that the defendants were either misled or prejudiced, I dismissed this preliminary objection too. Now, the appeal proper.

There is no dispute that the plaintiffs had been appointed by the defendants to supply and to install four units of lifts and 22 units of escalators at a premise known as Plaza Putra, Alor Setar. And, that two contracts were executed in relation to this appointment namely, the main contract of 16 March 1996 (exh 'MKT-1' to encl 7), and the sub-contract of 14 January 1997 (exh 'MKT-2' to encl 7) to which the current claim is primarily focussed.

However, whilst the plaintiffs claim that they are entitled to payment as they had fulfilled their contractual obligations to the satisfaction of the architect, the defendants contend otherwise. They allege, amongst other things, that the plaintiffs' work was shoddy and that the plaintiffs failed to complete the contract work within time. The defendants further allege that they had suffered a loss as they were forced to appoint another contractor to rectify the plaintiffs' shoddy work. And, towards the recovery of their loss they filed a counterclaim wherein the amount sought was in excess of the plaintiffs' claim. They were, therefore, entitled to withhold payment.

En Siau, in his reply, submits that the defendants' allegations are baseless and ought to be dismissed on two grounds. The first ground being that the common-law right of set-off in contracts of this nature had been extinguished by the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre* [1995] 2 MLJ 57. Secondly, the defendants do not have any evidence to support their counter-claim. It is En Siau's contention that in order to succeed on their claim, the defendants, by virtue of cl 8 of the sub-contract, is required to produce the architect's certification that there was delay and/or shoddy work. And, no such certificate was ever produced at the hearing of the application.

I shall deal with the first ground. The dispute in *Dr Leela's Medical Centre* arose out of the employer's refusal to make payments to the builder despite being served with the penultimate progress payment certificate. The employer had alleged that not only was the builder's work shoddy, the builder had also over-valued the work done. The High Court hearing the

builder's application for summary judgment gave the employer leave to defend on the grounds that there were triable issues which had to be determined at a trial. On appeal by the builder, the Supreme Court allowed the appeal. It is En Siau's contention that the appeal was allowed by the Supreme Court chiefly on the grounds that the Supreme Court held the view that the common law right of set-off had no place in building contract cases. On the strength of that decision, En Siau contends that the defendants had no right to withhold any sum of money whatsoever but was obliged to pay RM988,777.14 upon the expiry of 14 days after the service of each of the architect's certificates ie certificates nos 8, 9, 10 and 12 on them, especially, as cl 11(b) of the sub-contract mandated that: 'Within fourteen days of the receipt by the contractor of any certificate or duplicate copy thereof from the architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of the sub-contract works.'

With respect, En Siau appears to have misread the principle expounded in *Dr Leela's Medical Centre Sdn Bhd* 's case when he contended that the Supreme Court had made a blanket ruling ousting in toto the common-law right of set-off in all building contract cases. Indeed, in that case, Edgar Joseph Jr FCJ, who delivered the judgment of the Supreme Court cited with ready approval and adopted the following passage in the judgment of Lord Morris in the *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at pp 699 G–700A; [1973] 3 All ER 195 at pp 200J–201A:

> When parties enter into a detailed building contract there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contracts ... *Nor, if a contract provides for the issuing of interim certificates, should it be supposed that debts of a special class will come into existence, ie debts in relation to which there cannot under any circumstances be any defence or set-off.* Provisions governing such interim ceftificates will probably be found in the contract. (Emphasis added.)

Thus, following the ratio decidendi in the *Gilbert-Ash* case, our Supreme Court rejected the obiter dictum of Lord Denning in *Dawnays Ltd v Fg Minter Ltd & Anor* [1971] 2 All ER 1389; 1 WLR 1205 which enunciated that there was a special rule of construction applicable to cross-claims in building contract cases which ran counter to the principle pertaining to the right of set-off as originally laid down in *Mondel v Steel* (1841) 8 M & W 858 at pp 871-872; [1835-42] All ER Rep 511 at p 516, and subsequently entrenched in common law. In the words of Lord Denning, in the Dawnays case:

> An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. *Payment must not be withheld on account of cross-claims whether good or bad* — except so far as the contract specifically provides.

Clearly, in *Dr Leela's Medical Centre*, the Supreme Court had held that parties to a building contract may by express words or 'by clear implication' provide for the ouster or exclusion of the common law right of set-off; in other words, each case would turn upon the particular wording of the contract. And, in that particular case the Supreme Court did find that the

provisions of that governing PAM-formulated contract showed an implicit intention of the parties to exclude the right of set-off. Thus, the issue for this court to determine is whether from the wording of the sub-contract entered into in the present case, it can be implied that the parties had intended to exclude the right of set-off. It is my finding that no such exclusion was intended. Indeed, defendants' right to set-off against any sum or sums due has been clearly preserved by cl 13 of the sub-contract, which appears as follows:

> The Contractor shall notwithstanding anything in this sub-contract be entitled to deduct from or set-off against any money due from him to the Sub-Contractor (including any Retention Money) any sum or sums which the Sub-Contractor is liable to pay to the contractor under this Sub-Contract.

And, as the defendants' counter-claim is far in excess of the plaintiffs' claim, I am of the view that the learned SAR was right in allowing unconditional leave to defend.

Due to the provisions of cl 2 of the sub-contract, the instant case is also distinguishable from *Dr Leela's Medical Centre Sdn Bhd* 's case, in that whereas the architect in *Dr Leela's Medical Centre Sdn Bhd* was given the sole control over the supervision of the works, cl 2 of the sub-contract in the current case requires the plaintiffs to ensure that the work done is to the satisfaction of both the architect and the defendants. Clause 2 states:

> The Sub-Contractor shall execute and complete the sub-contract works subject to and in accordance with this sub-contract in all respects to the *reasonable satisfaction of the contractor* and of the architect for the time being under the main contract (hereinafter called 'the architect' which expression where the context of the main contract so requires shall mean and include the supervising officer) and *in conformity with all the reasonable directions and requirements of the contractor* including all reasonable rules of the contract or (so far as they may apply) for the time being regulating the due carrying and of the main contract works. (Emphasis added.)

And, it is clear from the list compiled by the defendants (see defendants' exh 'D' in encl 14) that the defendants had, quite early after the alleged completion of the works, made known to the plaintiffs their dissatisfaction of the plaintiffs' work. I further find that there is also a triable issue in relation to the plaintiffs' alleged defective work. It is the plaintiffs' stand that their work had been satisfactorily performed which they say has been confirmed ipso facto by the issuance of the architect's certificate. However, as pointed out by En Kartar, even the appointed architect was of the view that there were certain defects in the plaintiffs' work. The said architect had written to the plaintiffs a letter expressing dissatisfaction over the plaintiffs' work. This letter was exhibited as 'MTK-8' in the plaintiffs' second affidavit in support (encl 16). It reads as follows:

> Dear Sir,
>
> LIFTS & ESCALATORS
>
> 1 We refer to your letter dated 30 November 1997 ref: GEC/AS/C0-1151/1844 and the attached fax from BS Civil Engineering Sdn Bhd, dated 1/12/971/041/97 for your reference.

2 Re your para 3 please be informed that repair works are still incomplete and not acceptable to that consultants/owners' satisfaction.

3 *Please rectify all the defective works without any further delay.* (Emphasis added.)

4 By this copy of fax Jurutera Perunding Valdun Sdn Bhd, is to assist and monitor the rectification works.

5 Thank you.

Yours faithfully,

CHUA KA SENG PARTNERS CHARTERED ARCHITECTS

Enc:

cc Binaan Sentosa Sdn Bhd, (Attn: Mr Lee Chuck Kee) By fax
Jurutera Perunding Valdun Sdn Bhd (Attn: Mr Chow) By fax

To be fair to the plaintiffs, it has to be noted that they did carry out some remedial works and they also appointed an independent lift and escalator consultant firm known as Atwell International Ltd to undertake a survey. Atwell International Ltd did come up with a report namely exh 'MKT-11' to encl 14, which was favourable to the plaintiffs. But the crux of the matter is that the plaintiffs have failed to adduce any evidence to show that this report was acceptable to the architect. Thus, whether or not the architect was wholly satisfied with the plaintiffs' work is also questionable.

The plaintiffs had exhibited, as exh 'MTK-4' to encl (8), a statement of account of the amount they are seeking. This statement was deposed by the plaintiffs to be a true and correct statement obtained from their books. Amongst the details shown in this statement is a certification of the value of the plaintiffs' works by Jurutera Perunding Valdun Sdn Bhd, a consultant firm appointed by the defendants. In another column is a certification of the same works by the said architect. Although the certification of progress claim 1 to 5 tallied in both certification, the amount certified for progress payment no 6 differed, in that Valdun had certified the amount due as RM194,700, whereas the architect's certification showed the amount as RM312,200. This difference was unexplained. En Siau submitted that such difference and the absence of an explanation was immaterial, as the parties had contracted to make payments based on the architect's certificates, thereby making Valdun's certificate redundant. En Siau's submission at first sight appears reasoned. However, I note from exh 'MTK-8' in encl 14, that the architect had indeed relied on Valdun's report as a guide in the rectification works. By that letter, the architect had instructed the plaintiffs to comply strictly with Valdun's report. Under such circumstances, I am of the view that Valdun's role cannot be totally discounted and that the difference in the certification calls for an explanation.

As evidence of delay, the defendants exhibited the Certificate of Practical Completion dated 29 December 1997 (exh 'B' to encl 14) issued by the architect. By that certificate, the architect had certified that the date of completion was the 15 October 1997. Encik Siau submitted that this certificate was misleading as the certification was not restricted to only the

plaintiffs' work but was in respect of all works on the whole project. It is trite that it is the maker who should clarify and enlighten the court on the contents of the certificate, that is, the architect himself. And, since there was no clarification by way of affidavit, the architect's explanation should be heard at the trial.

I am conscious of the position in law, that merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification is unlikely to result in leave to defend. The ordinary practice is that there must be some real basis, not a shadowy basis, for showing that there is an issue worthy of investigation by the courts. In the current case, I am completely satisfied that there are some real basis worthy of investigation. The plaintiffs' appeal is largely grounded and premised on their contention that the architect's 'interim certificate is to be regarded virtually as cash, like a bill of exchange.' With this debunked, and the defendants' submission that they had suffered loss on rectification works only feebly resisted at this stage, the appeal naturally collapse.

Accordingly, the appeal is dismissed with costs.

Appeal dismissed.

Reported by Wong Siok Chin